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No. 00-843 (4)

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF AT&T WIRELESS SERVICES, INC., DMC STRATEX NETWORKS, INC., HARRIS CORPORATION, TELIGENT, INC., WINSTAR COMMUNICATIONS, INC., WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, AND XO COMMUNICATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

AT&T Wireless Services, Inc., DMC Stratex Networks, Inc., Harris Corporation, Teligent, Inc., Winstar Communications, Inc., the Wireless Communications Association International, and XO Communications, Inc. (the "Wireless Industry *Amici*"), hereby respectfully move, pursuant to this Court's Rule 37.2(b), for leave to file the attached brief as *amici curiae* in this case. The consent of all of the parties to the proceedings in the Court of Appeals was requested and the consent of the Petitioners and most of the other parties to the proceedings in the Court of Appeals has been obtained, as evidenced by written consents filed with the Clerk contemporaneously with this brief. The consent of potential respondents American Electric Power Service Corp., Amerite, BellSouth Corporation, Commonwealth Edison Co., Duke Energy Corp., Florida Power & Light Co., Houston Lighting & Power Co., Public Service Electric & Gas, Texas Utilities Electric Co., and Union Electric Co. d.b.a. Amerenue, was requested but refused.

The Wireless Industry *Amici* include telecommunications carriers that use wireless technologies to provide their services, a trade association of such carriers and related firms, and manufacturers of wireless equipment used by telecommunications carriers. A fuller description of each proposed *amicus* appears in the accompanying brief.

Petitioners advance two sets of issues, only one of which—the second—focuses directly on the common concerns of the Wireless Industry *Amici*. The second issue raised in the Petition concerns the extent to which the Eleventh Circuit misconstrued Section 224 of the Telecommunications Act of 1996, 47 U.S.C. § 224, to allow public utilities to discriminate among telecommunications carriers seeking regulated access to their poles, conduits, ducts, and rights-of-way on the basis of the technologies used by the carriers. If allowed to stand, the opinion of the Eleventh Circuit is likely to be relied upon by public utilities in an attempt to justify discrimination against carriers using wireless technologies to provide telecommunications services and in favor of carriers using wireline technologies, despite the statutory requirement in Section 224 that they provide access to their poles, conduits, ducts, and rights-of-way on reasonable terms to all telecommunications carriers, regardless of the technology a carrier employs. The Wireless Industry *Amici* are therefore vitally interested in the proper resolution of the wireless issue presented in the Petition.

The wireless issue presented in the Petition is of great potential importance to telecommunications competition and is therefore worthy of the attention of this Court. The wealth of industry experience that the Wireless Industry *Amici* bring to the case is likely to be helpful to the Court (1) in reaching a more complete understanding of the extent to which the Eleventh Circuit's decision fails to give effect to the procompetitive, technology-neutral intent of Congress, and (2) in

reaching a fuller understanding of the potential harm that the Eleventh Circuit's decision may inflict on competition and innovation in the telecommunications industry.

The Wireless Industry *Amici* therefore respectfully request leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

The Wireless Industry *Amici* seek to address the second of the two issues presented by the Petition which is, in substance:

> Whether Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224, requires local exchange carriers and other public utilities subject to that statutory provision to permit access to their poles, ducts, conduits, and rights-of-way, on reasonable and nondiscriminatory rates, terms, and conditions, to any telecommunications carrier, whether or not that carrier uses wireline facilities, wireless facilities, or some combination of both.

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BRIEF OF AT&T WIRELESS SERVICES, INC., DMC STRATEX NETWORKS, INC., HARRIS CORPORATION, TELIGENT, INC., WINSTAR COMMUNICATIONS, INC., WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, AND XO COMMUNICATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT[1]

AT&T Wireless Services, Inc., DMC Stratex Networks, Inc., Harris Corporation, Teligent, Inc., Winstar Communications, Inc., the Wireless Communications Association International, and XO Communications, Inc. (the "Wireless

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[1] In accordance with this Court's Rule 37.6, the Wireless Industry *Amici* respectfully state that this brief was authored entirely by counsel for the named *amici curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

Industry *Amici*") respectfully submit this brief as *amici curiae*, pursuant to Rule 37.2 of the Rules of this Court, in support of Petitioners Federal Communications Commission and United States of America.

INTEREST OF THE WIRELESS INDUSTRY *AMICI*

The Wireless Industry *Amici* are a group of companies and a trade association with diverse interests in the wireless telecommunications industry. They are joined by a common concern that the Eleventh Circuit's decision at issue here could lead to substantial new impediments to the ability of companies using wireless technology to compete effectively in the telecommunications industry. The Wireless Industry *Amici* have extensive relevant industry knowledge that is germane to the issues presented in this case and is not reflected in the Petition.[2]

AT&T Wireless Services, Inc., a subsidiary of AT&T Corporation, is in the business of providing both mobile and fixed wireless telecommunications services. AT&T Wireless uses poles, ducts, conduits, and rights-of-way owned and controlled by utilities in order to provide these services. It therefore has a direct and substantial interest in this case.

DMC STRATEX Networks Inc. is a supplier of radio equipment to operators of telecommunications systems utilizing wireless technologies, particularly microwave systems. It is familiar with the extent to which effective competition

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[2] The Wireless Industry *Amici* are aware of one additional petition for certiorari seeking this Court's review of the same Eleventh Circuit decision as is addressed in the Petition in this case: *National Cable Television Association, Inc. v. Gulf Power Company, et al.*, No. 00-832. That other petition seeks review of the decision below on grounds also raised by the United States in its Petition in this case but which are not addressed by the Wireless Industry *Amici*.

of operators is dependent upon access to utility poles, conduits, ducts, and rights-of-way including those in multi-tenant buildings.

Harris Corporation is a major supplier of equipment to telecommunications companies that employ wireless technologies such as microwave radio transmission. It is intimately familiar with the equipment and technologies used for wireless telecommunications, and in particular with the extent to which access to utility poles, conduits, ducts, and rights-of-way on reasonable and nondiscriminatory terms is essential to the competitive vitality of carriers employing wireless technology.

Teligent, Inc. is a fixed wireless carrier licensed by the FCC to provide voice and data telecommunications service via the 24 GHz frequency band and other common carrier microwave frequency bands. Teligent provides its services, including local telephone service, primarily by deploying fixed wireless broadband networks in numerous cities throughout the United States.

Winstar Communications, Inc. is a national facilities-based broadband service company offering local and long distance telecommunications, high-speed Internet, and data services using, among other technologies, its fixed wireless systems that operate in the 38.6-40.0 GHz, Local Multipoint Distribution Service ("LMDS"), and 18 GHz bands. As the result of a spectrum auction that concluded in the acquisition of additional licenses in October 2000, Winstar now holds nearly ubiquitous broadband spectrum coverage throughout the contiguous United States, Alaska and Hawaii. It currently offers wireless links that operate at up to 200 megabits per second.

The Wireless Communications Association International is the primary trade association worldwide for companies that provide broadband telecommunications services using fixed (as opposed to mobile) wireless technology. Its 415 members

on six continents include the vast majority of the world's leading fixed wireless licensees and manufacturers of fixed wireless equipment.

XO Communications, Inc. provides local, long distance, data and enhanced telecommunications services utilizing high capacity, local fiber optic and wireless networks in the United States and internationally. XO also is the holder of the largest collection of broadband wireless licenses in the country. Its LMDS licenses and 39 GHz licenses cover substantially all of the largest markets in the United States. The company plans to use wireless technology to connect more customers directly to its local networks.

This case involves issues of special importance to companies that use wireless technologies to provide their telecommunications services. The opinion of the Eleventh Circuit can be interpreted literally to deny the statutory right of at least some telecommunications carriers to attach antennae to utility poles on regulated terms and conditions. If allowed to stand, the decision will likely suggest to the public utilities that control access to poles, conduits, ducts, and rights-of-way that they may exclude or discriminate against carriers employing wireless technology from access on reasonable terms to the full range of facilities (poles, ducts, conduits, and rights-of-way) to which Congress intended all such telecommunications carriers to have access.

The Eleventh Circuit's decision to exclude wireless antennae from the attachments covered by Section 224 of the Communications Act was, as the Petition shows, the product of an erroneous statutory construction. That construction was accompanied by the Eleventh Circuit's incorrect and extra-record assumptions regarding the nature of wireless telecommunications technology. These assumptions reflect the Eleventh Circuit panel majority's apparent failure to appreciate the wide variety of wireless technologies used to provide

telecommunications services and the critical needs for access to utility poles, conduits, ducts, and rights-of-way necessarily associated with the use of such technologies. As active participants in the deployment of wireless technology, the Wireless Industry *Amici* are in a position to be particularly helpful to the Court in highlighting the substantial and important negative consequences that may befall telecommunications competition if the Eleventh Circuit's decision is permitted to stand.

STATEMENT OF THE CASE

The Wireless Industry *Amici* adopt the statement of the case set out in the Petition and offer the following supplemental points as predicates for the argument that follows.

Section 224, granting all telecommunications carriers (other than the monopoly incumbent local exchange carriers) a right of access to utility poles, conduits, ducts, and rights-of-way on regulated terms and conditions, was enacted as part of the sweeping revision of the Communications Act of 1934 that Congress effected in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"). Through enactment of the 1996 Act, Congress sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 1 (1996).

The 1996 Act amended Section 224 to require the Federal Communications Commission ("FCC") to prescribe regulations to govern the charges that utilities could impose for the use of utility poles, conduits, ducts, and rights-of-way by telecommunications carriers to provide telecommunications services. 47 U.S.C. § 224(e). The FCC conducted a rulemaking to implement this statutory provision, in the course of

which the utilities argued, *inter alia*, that telecommunications carriers using wireless technology were not among the telecommunications carriers entitled to regulated access to their poles, conduits, ducts, and rights-of-way. The FCC rejected the utilities' arguments and concluded that carriers using wireless technology are entitled to the benefits and protections of Section 224. *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6798 (1998) ("*Pole Attachment Order*").

On review, a divided panel of the Eleventh Circuit declined to accord deference to the FCC's construction and implementation of Section 224 on the grounds that Section 224 unambiguously expressed a Congressional intent to deny the benefits and protections of Section 224 to at least some telecommunications carriers employing wireless facilities. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1273 n.21 (11th Cir. 2000) ("*Gulf Power II*"). The panel majority discerned the unambiguously expressed intent of Congress not from the express language of the statute but rather by deducing a "negative implication" from examination of two distinct parts of the statute. *Id.* at 1274. The panel majority then advanced a series of factual assertions regarding the nature and needs of telecommunications carriers using wireless technologies that are neither supported by the FCC's decision nor compelled by the administrative record before the FCC, apparently to buttress the conclusion that Congress intended to exclude such carriers from the benefits and protections of Section 224.

SUMMARY OF ARGUMENT

The FCC correctly determined that Congress intended all competitive telecommunications service providers, regardless of the technologies they employ in providing their services, to enjoy a right of access to the poles, conduits, ducts, and rights-of-way of traditional utilities on regulated terms and

conditions. This necessary determination regarding the scope of Section 224 substantially enhanced the potential for competition by and among service providers using a variety of technologies, including particularly wireless technologies. The Eleventh Circuit's reversal of the FCC's decision creates tremendous uncertainty for carriers that use wireless technology about the extent to which they enjoy the benefits and protections of Section 224 solely on the basis of the technology they use, a result that threatens to undermine the competition that Congress intended the FCC to encourage. Telecommunications carriers that utilize wireless technology generally need reasonable and nondiscriminatory access to utility poles, conduits, ducts, and rights-of-way, and the Eleventh Circuit opinion will create substantial new obstacles to obtaining such access without harmful delay and expense. Competition and the consumer benefits it brings are likely to be constrained or entirely subverted by those new obstacles.

Although it characterized its statutory construction as one based in plain language, the Eleventh Circuit panel majority opinion relies to a significant degree on stated and implied factual assumptions about the characteristics of wireless telecommunications technology. Those assumptions reflect an incomplete and incorrect understanding of wireless technologies and their use by telecommunications carriers. Wireless technologies take a wide variety of forms and are used to differing extents by a variety of different carriers to provide services including, for example, point-to-point transmissions that closely resemble wire transmissions, point-to-multipoint transmissions from or among fixed transmitters and receivers, and communications between fixed base stations and mobile wireless devices. All of these uses depend, at least in part, on the use of both wireline and wireless technology. The Eleventh Circuit's opinion ignores this diversity and focuses instead only on one possible form of antenna attachment for mobile services. When the full range of possible wireless

services and their needs for access to utility poles, conduits, ducts, and rights-of-way are taken into account, the disparity between Congress' intent and the Eleventh Circuit's construction of Section 224 becomes especially clear, as does the urgent need for review in this Court.

For these reasons, the Wireless Industry *Amici* respectfully support the Petition.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION COULD SUBSTANTIALLY IMPAIR COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY BY FIRMS EMPLOYING WIRELESS TECHNOLOGY, IN CONTRAVENTION OF THE CONGRESSIONAL PURPOSE TO PROMOTE SUCH COMPETITION.

Congress intended in the 1996 Act to promote competition and innovation in telecommunications services and specifically sought to eliminate discrimination among the various technologies that might be used by providers of telecommunications service. Those intentions are evidenced by the 1996 Act's definition of "telecommunications service" to include the provision of such services "regardless of the facilities used." 47 U.S.C. § 153(46). Multiple varieties of wireless services are available to users today from a wide array of competing carriers. These carriers, many of whom are in the initial deployment stages, use a combination of wireline and wireless technologies to provide their services. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, 2000 FCC LEXIS 4411, at *49 (Aug. 21, 2000) ("*Advanced Services Second Report*")

("Wireless services and technologies have the potential to deliver high-speed services to residential, rural, and otherwise underserved areas and to increase competition in the last mile in the near future."); *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 00-289, 2000 FCC LEXIS 4372, at *51 (Aug. 18, 2000) ("Increasing [Minutes Of Use] . . . may also indicate that mobile telephony is moving away from just complementing existing wireline voice service and towards competing directly with it.").

The Eleventh Circuit properly recognized that poles, ducts, conduits, and rights-of-way are essential facilities. *Gulf Power II*, 208 F.3d at 1266. The duplication of utility pole and conduit networks is an economically infeasible enterprise. *See* S. Rep. No. 95-580, at 12 *reprinted in* 1978 U.S.C.C.A.N. 109, 121. Moreover, as the Eleventh Circuit recognized, attempts to construct or acquire new poles, conduits, ducts, and rights-of-way are impeded or prevented not only by economic barriers, but also by many State and local governments that, for a variety of reasons, limit the ability of cable operators and telecommunications carriers to obtain rights-of-way or construct transmission facilities that duplicate existing utility facilities. *Gulf Power II*, 208 F.3d at 1266. As a result, the number of transmission routes and facilities remains limited, and providers of wireless services must therefore depend upon access to the utilities' poles, ducts, conduits, and rights-of-way to provide the congressionally-desired competition.

The Eleventh Circuit's opinion misunderstood the common industry practice of referring to "wireline" and "wireless" carriers. In industry practice and as understood by the FCC, these terms refer to a given carrier's predominant technology, and do not imply that a given carrier relies exclusively on

wireless or wireline technology. In contrast, the Eleventh Circuit panel majority appears to be unaware of the frequent combination of technologies in a single network. *See, e.g., Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, Form 10Q, for the quarterly period ended September 30, 2000, Commission file number: 0-30900, XO Communications, Inc., XO Capital, Inc., at Section 1, *available at* http://www.sec.gov/Archives/edgar/data/1111634/000095013300004526/w42519e10-q.htm ("In some cases, we will make this direct connection by constructing a new fiber optic extension from our network to the customer's premises. In other cases, using our fixed wireless spectrum, we will deploy a high-bandwidth wireless connection between an antenna on the roof of the customer's premises and an antenna attached to our fiber rings.").

While the Eleventh Circuit panel majority's opinion can fairly be interpreted to address only the attachment of mobile wireless carriers' antennae to utility poles, it is reasonable to expect that the utilities that have so fiercely resisted the FCC's efforts to implement Section 224 will take full advantage of the opportunities created by the panel majority's language and reasoning to attempt to rationalize continuing denials of regulated access to their poles, conduits, ducts, and rights-of-way to other forms of attachments by carriers using wireless technology. The doubt, delay, expense, and uncertainty that are likely to result from such denials and the efforts to overcome them have a substantial potential to undermine the competitive vitality of carriers that utilize wireless facilities to provide their services.

Nothing in the language, history, or purpose of the 1996 Act can be understood to express in any way a Congressional intent to favor any particular technology over another in the competition that Congress sought to encourage. However, the Eleventh Circuit did just that. The *Gulf Power II* decision could be misconstrued in a manner that would competitively

disadvantage participants in the telecommunications industry that utilize wireless technology vis-à-vis their competitors that rely on wireless connections, and will impair the provision of intermodal competitive telecommunications services envisioned — indeed, promoted — by the 1996 Act. For example, to the extent that the utilities were predictably to deny carriers that rely primarily on fixed and mobile wireless facilities the Section 224 access that is granted their wireline competitors (sometimes using exactly the same space), the Eleventh Circuit placed wireless carriers at a competitive disadvantage.

The Eleventh Circuit's denial of the benefits and protections of Section 224 for a large sector of the telecommunications industry defeats Congress' purpose and risks jeopardizing telecommunications competition. The consequent harm that may befall the wireless telecommunications industry as a result of the Eleventh Circuit's erroneous legal analysis compels the Court's review of the *Gulf Power II* decision.

II. THE ELEVENTH CIRCUIT'S ERRONEOUS STATUTORY CONSTRUCTION APPEARS TO PROCEED IN PART FROM AN INCORRECT UNDERSTANDING OF THE DIVERSE CHARACTERISTICS OF WIRELESS TELECOMMUNICATIONS TECHNOLOGIES.

Although it characterized its holding as one based on the plain language of Section 224, the Eleventh Circuit nonetheless included within its reasoning related to Section 224's application to wireless carriers an erroneous set of factual assumptions that lack support in and were not cited to the record before the court. The assumed facts were not found by the FCC and appear in part in the FCC's Order only in the course of a description of an argument that the agency ultimately rejected. *Pole Attachment Order*, 13 F.C.C.R. at 6799 (FCC rejecting the utility assertion that differences between some wireless equipment and wireline equipment would ren-

der application of the FCC's pole attachment regulations to wireless carriers difficult as a practical matter).

The FCC properly rejected the utilities' efforts to limit their obligations under the statute on the artificial basis of the technology predominantly employed by a telecommunications service provider. As the expert agency, the FCC knew that, while individual carriers may typically depend at any given time more heavily on one form of technology than another, many carriers use a combination of wireline and wireless facilities to provide their services. *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Teligent, L.L.C., at 9-10 (filed Sept. 26, 1997) (explaining the wireline and wireless components of a fixed wireless network and demonstrating the need for fixed wireless carrier access to utility rights-of-way). Consequently, the FCC read the plain language of Sections 224 and 153(46) to mean that the Section 224 benefits should be available to all telecommunications carriers regardless of the technologies employed by any given carrier. *Pole Attachment Order*, 13 F.C.C.R. at 6798.

Judicial deference to agency discretion is premised, in part, upon the agency's unique expertise in complicated arenas of regulation. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (Congress' deliberate adoption of the deferential arbitrary and capricious standard frees reviewing courts from the task of weighing the evidence and affords proper respect to the expertise of the agency). The scope of review under this standard is narrow and "a court is not empowered to substitute its judgment for that of the agency." *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 803 (1978) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Of particular relevance to the instant matter, this Court has admonished that when an

agency makes determinations "within its area of special expertise, at the frontiers of science," "a reviewing court must be at its most deferential." *Baltimore Gas & Elec. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

In concluding that Section 224 does not extend to wireless facilities, the Eleventh Circuit failed to defer appropriately to FCC factual determinations within the agency's area of special expertise. Instead, it assumed away the very foundation of Congress' intent in enacting Section 224—that a variety of technologies should have the benefit of access to existing public utility poles, ducts, conduits, and rights-of-way to the extent they are willing to pay a just and reasonable rate for such access. *See* H. Rep. 104-204, at 91 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58 ("The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy. Section 105 is intended to remedy the inequity for pole attachments among providers of telecommunications services.").

The Eleventh Circuit's unsupported factual assertion that "Petitioners' poles are not bottleneck facilities for wireless carriers" was erroneous. *Gulf Power II*, 208 F.3d at 1275. The panel majority's decision went on to assert that:

> it is highly questionable whether there are any bottleneck facilities for wireless systems. What is beyond question is that utility poles are not bottleneck facilities for wireless systems. Because they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers.

Id. The opinion also asserts without reference to the underlying factual record that "[m]ost of this [wireless] equipment can be placed on any tall building, and the whole set-up requires more physical space than a wireline system." *Id.*

As a legal matter, the Petition demonstrates that Congress itself determined that utility poles, conduits, ducts, and rights-of-way are bottleneck facilities for all telecommunications carriers, including those that employ wireless technology. As a factual matter, many wireless facilities cannot be placed on simply any building, but instead must be placed on or immediately adjacent to the particular building to which they are providing service in order to serve the customer residing within that building. For example, a fixed wireless carrier must install wires through a building that connect its rooftop wireless antenna to its in-building customer using utility ducts, conduits, and rights-of-way. *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-57, 2000 FCC LEXIS 5672, at *153-*54 (Oct. 25, 2000) ("In order for a customer to receive fixed wireless service at home or at the office, that customer must be able to place an antenna at the fixed site . . . . [T]he inability of a customer to place an antenna at the customer's fixed site will result, with few exceptions, in the denial of fixed wireless service to that customer . . . .").

In many cases, wireless facilities are connected to a larger network using wireline facilities. For the purpose of traffic backhaul, mobile wireless systems often use wireline facilities that traverse utility facilities. *See Federal Communications Comm'n v. Gulf Power Co.*, No. 00-843, Petition for a Writ of Certiorari at 21. Even the electric utilities themselves

utilize their own poles to support their own retail wireless operations. *See, e.g.*, Southern Company, *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal Year Ended December 31, 1999 (10K)*, at I-3 (filed Mar. 27, 2000)(describing the company's digital wireless retail operations in the Southeast United States).

The Eleventh Circuit also described a method of how "wireless systems" operate that is not only uncited to the record before the court but also incorrect. In explaining the differences between wireline and wireless systems, the court stated that "wireless networks . . . transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions." *Gulf Power II*, 208 F.3d at 1275. This depiction arguably is descriptive of certain cellular and PCS telephone networks but does not describe accurately the facilities used by a significant number of other providers of materially different wireless services. Even for cellular and PCS services, in unpopulated areas utility transmission towers may be the only structures available. Technologically, the court's description was unduly narrow and untrue for fixed wireless systems. *Advanced Services Second Report*, 2000 FCC LEXIS 4411, at *52 ("[O]nce a wireless provider has installed its antenna in an area, it completes the last-mile connection by installing an on-premises transceiver only for those customers who have actually subscribed to its service.") The court also ignored the extensive use of wires in wireless systems for traffic backhaul, redundancy, intermodal operations, in-building transport, and other purposes.

The Eleventh Circuit failed to address the fact recognized by Congress that utilities enjoy unique access to public rights-of-way, and that such access was funded almost entirely by the ratepaying public. Congress required, and the FCC rec-

ognized in its rulings, that reasonable access to such rights-of-way, as defined by Section 224, is essential to provide the benefits of competition and new technology to the public.[3]

CONCLUSION

Review by this Court of the Eleventh Circuit's *Gulf Power II* decision is warranted because of the severe harm to congressionally-intended telecommunications competition that will result from its legal and factual error. For the foregoing reasons, the Petition of the Federal Communications Commission and the United States should be granted.

Respectfully submitted,

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[3] Even if the Eleventh Circuit were correct in its apparent conclusion that the FCC's decision was not adequately grounded in the facts, the proper course of action would have been to remand the matter back to the agency for further factual inquiry. *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973)) ("If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.'"). Instead, the Eleventh Circuit assumed the role that Congress has assigned to the FCC and reached its own factual conclusions that are incompatible with those underlying the FCC's decision and unanchored in the record.

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